Supreme Court, U.S.
FILED

No. 02- 02 326 AUG 29 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LORN ALEXANDER ROLLE,
NAKIA MARCKEY,
and SHANNON HARRIS,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD F. DELLA FERA
Counsel for Petitioners
110 SE 6th Street
Suite 1970
Fort Lauderdale, FL 33301
(954) 761-7201

175939

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

21 pp.

QUESTION PRESENTED FOR REVIEW

Whether district court's attribution of a drug quantity at sentencing must be supported by more than extrapolation by the government's witness in order to comply with due process?

PETITION FOR WRIT OF CERTIORARI

Lorn Alexander Rolle, Nakia Marckey and Shannon Harris respectfully petition the Supreme Court of the United States for a writ of certiorari to review the unpublished judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered on May 31, 2002, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in Appendix A. Excerpts of the sentencing hearing in the district court dated October 12, 2001 is contained in Appendix B.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on May 31, 2002. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28. U.S.C. § 1331 and 21 U.S.C. § 952. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

> No person shall . . . be deprived of . . . liberty . . . without due process of law. *U.S. Const. Amend. V.*

STATEMENT OF THE CASE

Petitioners were convicted by a jury in the United States District Court for the Southern District of Florida of importation of cocaine in excess of five kilograms under 21 U.S.C. § 952. At sentencing, the district court sentenced each Petitioner to 235 months imprisonment based upon a finding that the offense involved 502 kilograms of cocaine. Petitioners objected to this finding as the testimony at trial by the government's drug expert was that the expert had only tested only ten of the 502 kilograms of substance that was seized in the case. Petitioners argued that their sentences should be based upon ten, not 502, kilograms. The objection was overruled and the Eleventh Circuit affirmed the finding of the district court.

REASONS FOR GRANTING THE PETITION

In the opinion by the United States Court of Appeals for the Eleventh Circuit in this matter, the court has sanctioned a procedure by the district court which offends a criminal defendant's due process rights. The district court allowed the government to rely upon an extrapolation from ten to over five hundred kilograms of cocaine in imposing a sentence under the sentencing guidelines. The expert at trial testified that he only tested ten of the five hundred-plus kilograms of substance that was seized in this case and that those ten kilograms tested positive for cocaine. Petitioners due process rights were violated when the district court relied on the expert's extrapolation that all five hundred-plus kilograms of substance was cocaine. As a result of the district court's acceptance of the extrapolation by the witness, Petitioners' total offense level was enhanced from 32 to 38. Thus, at level 32, Petitioners' sentencing guideline range would have been 121-151 months as opposed to the 235 month sentences imposed based upon a level 38. Petitioners

therefore pray that this Court exercise its supervisory powers as the Eleventh Circuit has sanctioned the district court's departure from the accepted and usual course of judicial proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD F. DELLA FERA
Counsel for Petitioners
110 SE 6th Street
Suite 1970
Fort Lauderdale, FL 33301
(954) 761-7201

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS DATED AND FILED MAY 31, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-16084
Non-Argument Calendar

D.C. Docket No. 01-08057-CR-DMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LORN ALEXANDER ROLLE,
NAKAI MARCKEY, and
SHANNON HARRIS,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

(May 31, 2002)

Before CARNES, BARKETT and WILSON, Circuit Judges.

Appendix A

PER CURIAM:

Lorne Alexander Rolle, Nakai Mackey, and Shannon Harris each received a 235-month sentence after they were convicted for importation of a mixture containing cocaine in violation of 21 U.S.C. § 952(a), possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and conspiracy to import cocaine in violation of 21 U.S.C. § 963. They now appeal their convictions and sentences, contending the district court erred in not granting a mistrial based on the government's discovery violations, admitting irrelevant and prejudicial evidence, permitting the verdict to stand where there was insufficient evidence, and improperly attributing the quantity of drugs to the appellants at sentencing. We find no reversible error and affirm the district court's decision.

I. DISCOVERY VIOLATIONS

Appellants contend the district court erred by failing to grant a new trial based on two discovery violations.[1] First, they argue that, prior to trial, the government was aware that Officer Higgs would testify about his out-of-court identification of Harris, but the government failed to disclose that information to them. That failure to disclose, they assert, was prejudicial to Harris because it denied him the opportunity to move to suppress the evidence, and it was prejudicial to the other defendants because they could have filed severance motions if Harris' suppression motion were denied. Second, they contend that the government failed to

1. Although the appellant's contentions could be read to assert *Brady* claims, the appellants raise them only in the context of Rule 16 violations, and we limit our analysis to that context.

timely notify them of exculpatory fingerprint results, asserting that the late disclosure during the trial was prejudicial because it prevented them from making investigative use of the information. The district court determined that the government committed discovery violations but that those violations were not prejudicial to the appellants and did not warrant sanctions.

We review a district court's decision whether to impose sanctions for discovery violations only for abuse of discretion. *See United States v. Fernandez*, 780 F.2d 1573, 1576 (11th Cir. 1986). We will not reverse a conviction based on the government's violation of a discovery order unless the appellant demonstrates that the violation prejudiced his substantial rights. *See United States v. Chastain*, 198 F.3d 1338, 1348 (11th Cir. 1999). Substantial prejudice is shown "when the defendant shows that he was unduly surprised and did not have an adequate opportunity to prepare a defense or that the mistake had a substantial influence on the jury." *United States v. Rivera*, 944 F.2d 1563, 1566 (11th Cir. 1991).

Regarding Higgs' out-of-court identification of Harris, the appellants fail to show substantial prejudice. In addition to Higgs, other witnesses identified Harris. Further, the appellants had the opportunity to cross-examine Higgs and the other witnesses. *See United States v. Mills*, 704 F.2d 1553, 1563-64 (11th Cir. 1983).

The appellants also fail to show substantial prejudice regarding the fingerprint results they learned of in the middle of the trial. Two days earlier, on the first day of the trial, they had been informed by the government that it had found a

different set of latent prints that had sufficient detail to make a positive identification and that did not match any of the appellants' fingerprints. The appellants made no effort to investigate the identity of the person who made those prints, and they did not claim that they needed time to do so. The appellants fail to show how the government's failure to disclose the second set of prints until the middle of the trial affected their ability to present a defense.

II. IRRELEVANT AND PREJUDICIAL EVIDENCE

The appellants contend the district court erred in admitting into evidence two pieces of evidence: Rolle's passport with a torn front page and missing photograph, and testimony that a global positioning satellite system (GPS) showed that the appellant's vessel made a trip from Bimini to Florida and back the day prior to the instant arrest. The appellants claim that evidence violated Rule 401 because it is irrelevant or, alternatively, that it violated Rule 403 because it is more prejudicial than probative. District courts have broad discretion in determining the admissibility of evidence, and we review their evidentiary rulings only for abuse of discretion. *See United States v. Collins*, 779 F.2d 1520, 1531 (11th Cir. 1986).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Courts may exclude evidence that would otherwise be admissible where the probative value of that evidence is substantially outweighed by the danger of unfair prejudice

to the defendant. Fed. R. Evid. 403; *see also United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983). If evidence has any probative value, the federal rules favor the admission of that evidence over its exclusion, and Rule 403 should be used sparingly. *King*, 713 F.2d at 631.

The district court determined that the probative value of the evidence concerning Rolle's passport and the vessel's prior travels outweighed its prejudicial effect. The parties contested whether the appellants were connected to the drugs seized in the immediate vicinity of their vessel. Both pieces of evidence were probative of the appellants' involvement in the importation scheme, because they tended to explain the chain of events and the set-up of the charged crimes, and because they were linked in time and circumstances with the charged crimes. *See United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985). Therefore, the district court's decision to admit that evidence was not an abuse of discretion.

III. SUFFICIENCY OF THE EVIDENCE

The appellants contend there was insufficient evidence to support their convictions, because the government failed to show a connection between the cocaine retrieved from the ocean and them. They argue that a reasonable doubt existed as to their involvement with the seized drugs based on the fact that: the splashes in the water seen on the GPS videotape could have been caused by many different sources; a number of persons at the scene did not see the splashes; and there was testimony that the cocaine came either from an airdrop or another boat in the area. We review *de novo* the district court's decision, viewing the evidence in the light

most favorable to the government. *See United States v. Lopez-Ramirez*, 68 F.3d 438, 440 (11th Cir. 1995). We will uphold a conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

At trial, four marine enforcement officers testified that they each saw one of the appellants throwing large black bales overboard. The officers aboard the helicopter, who recorded the appellants' movements during the pursuit, testified that they recorded splashes in the water, which indicated to them that the appellants were throwing objects into the water. The government presented testimony that there were no other vessels or airplanes within three miles of the appellants' vessel and that the splashes could not have been produced by some other source. The government also produced the GPS videotape recording of the pursuit. That evidence is sufficient to permit a reasonable trier of fact to conclude beyond a reasonable doubt that the cocaine was connected to the appellants and that the appellants were guilty of the crimes for which they were convicted.

IV. ATTRIBUTION OF DRUG QUANTITY

The appellants contend the district court erred at sentencing by attributing to them 502 kilograms of cocaine, arguing that they should be accountable only for the ten packages actually sampled by the forensic chemist instead of the combined weight of all the packages seized by the agents. A district court's determination of the quantity of drugs attributable to an appellant for sentencing purposes is

a factual finding we review for clear error. *See United States v. Agis-Meza*, 99 F.3d 1052, 1054 (11th Cir. 1996).

The government must prove drug quantity by a preponderance of the evidence. *Id.* at 1055. "In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a). Although we have not determined the exact scientific or statistical precision required to calculate drug quantity, other circuits have held that reasonably accurate scientific testing is sufficient for sentencing purposes. *See, e.g., United States v. McCutchen*, 992 F.2d 22, 26 (3d Cir. 1993); *United States v. Uwaeme*, 975 F.2d 1016, 1018-19 (4th Cir. 1992).

Here, the chemist testified about how he conducted his analysis and explained that he followed the Drug Enforcement Administration sampling plan. He also testified that he obtained a random sampling and that statistical analysis established that there were more than 502 kilograms of cocaine. That evidence provided sufficient indicia of reliability to support the accuracy of the 502 kilogram figure, and the district court did not clearly err in attributing that amount to the appellants.

V. CONCLUSION

For the foregoing reasons, the appellants' convictions and sentences are AFFIRMED.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF SENTENCING HEARING BEFORE THE HONORABLE DONALD MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE DATED OCTOBER 12, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

UNITED STATES OF AMERICA

vs.

LORN ALEXANDER ROLLE, SHANNON HARRIS & NAKAI MARCKEY,

Defendants.

TRANSCRIPT OF SENTENCING HEARING BEFORE THE HONORABLE DONALD MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE

[commencing at page 2] THE COURT: This is sentencing in the case of the United States versus Rolle, Harris and Marckey, Case Number 01-8057. May I start with appearances please.

MS. ATKINSON: Karen Atkinson for the United States, Your Honor. Good morning.

THE COURT: Good morning.

MR. ELSO: Good morning, Your Honor. J.C. Elso on behalf of Nakai Marckey, who is present.

MR. ALMON: Tom Almon, Your Honor, on behalf of Mr. Rolle, who is present.

MR. LICHTER: Good morning, Your Honor. Irwin Lichter on behalf of Mr. Shannon Harris, who is present.

THE COURT: Good morning. I have reviewed the presentence investigation reports and the objections to the reports. Are there any other filings?

MS. ATKINSON: Not that I am aware of, Your Honor.

THE COURT: Okay. It looks like all three defendants object to the enhancement for reckless endangerment and Mr. Marckey has an additional role objection. Does that basically cover where we are?

MR. ELSO: That and we have an objection to the amount of drugs attributable to Mr. Marckey, Your Honor.

THE COURT: Well, it was unclear why you had [3] that objection. There was no specificity about it. What's the problem with the drug amount?

MR. ELSO: The drug amount, Your Honor, was, according to the testimony of the chemist in this case, Eric Jordan, and the Court will recall Eric Jordan testified during the course of the trial that he had examined, the only drugs that he had examined were ten packages which he was able to determine were cocaine, he never examined any other packages.

Appendix B

What he did was he opened two packages completely, tested them with three different tests that he performed on them to determine that they were cocaine, he then extrapolated the weight and came out with the weight of 502 kilos. If the Court will recall, and I am sure that his testimony would bear it out, I questioned him and questioned him specifically as to, since there was an issue, if the Court will remember as well, that there were bundles that were packaged differently, some were white, some were black, some had rope, some didn't, he indicated that the only thing he did was he opened or cut into ten kilo shaped packages and only tested ten kilo shaped packages and those ten tested positive for cocaine.

So I don't have any objection obviously to the defendant being based, his sentence being based on what, [4] in fact, was cocaine and testified to by the government witness as to what, in fact, was cocaine, and I think there's a number of cases that, although they illustrate my argument, Your Honor, there's nothing I found in the Eleventh Circuit or anywhere else that indicated that the government can rely upon that type of extrapolation.

And I have the case of United States versus Jackson, 15 Fed.3d, 843, an Eleventh Circuit opinion from 1997. Although that case, the facts of that case are different, the Court held in that case, actually I think the facts of that case are stronger for the government, and the Court reversed. In that case there was a, the defendant was held accountable for an entire kilo of cocaine which was, in fact, tested, the chemist determined that only one percent or ten grams of the kilo was actual cocaine, the other 99 percent was sugar,

Appendix B

Mr. Jackson was sentenced to the entire weight of the kilo of cocaine, and the 11th Circuit reversed saying that the calculation can only be based on what actually was cocaine.

THE COURT: Well, that's a little different case, though, than here.

MR. ELSO: Oh, absolutely. Here there is no evidence that the packages that the government seized [5] other than the ten that were actually tested are, in fact, cocaine. We don't even have a presumptive test, a preliminary test, indicating that any of those packages even contained one percent of cocaine. There's no evidence that those packages contained cocaine at all.

So I agree, this case, Your Honor, Jackson I think is even stronger for the government, and, in fact, the government was reversed. There's also — and it refers to, I think they distinguish the Supreme Court's decision in United States versus Chapman, and I don't know if the Court is familiar with — or Chapman versus the United States rather.

That's a case dealing with the same issue but dealing with LSD and whether or not the entire weight of drugs can be considered and the blotter paper. And all these cases that I found, Your Honor, United States versus Roland de Gabrielle, also an Eleventh Circuit from 1991, they all deal with issues stronger than the case here where the actual substance was tested but part of it tested. It dealt more with like the pure level.

Here there is no issue, there's no issue that, as to purity level, there's no question because there was no test done of the majority of these exhibits that the government presented. And I think, based on the evidence in the record, unless the government has [6] additional evidence, Your Honor, that, in fact, these kilos, in fact, or packages tested positive for cocaine, I think that the only evidence that is before the Court is that, in fact, ten packages are cocaine. That is the crux of my argument.

THE COURT: Okay, thank you.

Ms. Atkinson, why don't we take that argument first. Do you want to respond?

MS. ATKINSON: Yes, Your Honor.

In the first place, Mr. Elso has misstated the law. First of all, he didn't give the Court or the government the courtesy of citing all these cases, and, second of all, he is going back to a mixture and substance containing a detectable amount of cocaine is the way the statute was written and the way the indictment was done.

I am not familiar with that case but perhaps in that case the government says a kilo of cocaine, not a mixture and substance containing a detectable amount of cocaine. Neither the guidelines or law reflect that you must have a certain amount of purity nor must it be pure cocaine or heroin or anything else of that nature. So that flies out the window. And the Court gave an instruction on that issue.

Second of all, he said they extrapolated the [7] weight, they didn't extrapolate a weight. There was a gross weight and net weight. The first weight was weighed by the agents on the scene and that was a much higher weight. The actual weight of the kilos was done by the chemist in Miami and that was 502.8 kilograms of cocaine.

I recall the chemist's testimony, and what he said was you couldn't test every single kilo because he would still at the time of trial be testing the kilos. But he took a representative samples from a number, and it was more than 10, I believe it was 15 or 20, ground them up and then did the test, and in his expert opinion all the amount was cocaine.

Also, you have the common sense argument that they're not bringing sugar in, that they were all wrapped alike and representative samples of 15 to 20 different packages of all cocaine, it is cocaine, Your Honor, and I think, based on the standards you apply here, these defendants are liable for the 502.8 kilograms that they imported into the United States.

MR. ELSO: Your Honor, if I may respond briefly, the case law that I referred the Court to deals with the exact issue that government counsel has just brought up. The Chapman case and Roland de Gabrielle and U.S. versus Jackson go into whether or not it's a [8] detectable mixture containing a detectable amount of cocaine.

I agree with government counsel, I agree that if it is a mixture, regardless of the purity level, if there's a mixture, a combined mixture, okay, the courts have held that and they have tested it, and it's a combined mixture, that the defendant

should be held accountable for the entire mixture. This case deals with the fact that in this case they actually tested it, the chemist testified, and he testified as to how his test was and he testified that 99 percent was sugar and it wasn't mixed with the ten percent that was, in fact, cocaine.

The chemist, Your Honor, was the government's 15th witness, and, with all due respect to the government, testified that he got, he examined two kilos, opened them up and weighed those two kilos and extrapolated the weight, and, exactly as government counsel said, came out to a weight of 502.8 based on that extrapolation.

On cross-examination, Your Honor, I stood up, I stayed at defense counsel table when I questioned this witness, Eric Jordan, specifically asked him how many kilos or packages did he test, and he tested, he testified he only tested 10. There was only 10 packages [9] that tested positive for cocaine. Then is when on redirect government counsel asked him, "How long would you be if you had to test them all?"

Well, with all due respect, Mr. Marckey is facing a severe sentence based on common sense that the government has not established that 502 packages were cocaine. And the burden is on the government to establish and prove, present evidence to this Court that in the entire weight was cocaine, not to guess and to figure that, well, you know, what else would they be importing or bringing into the country.

That's not the standard. The standard is the burden is on the government to establish the evidence and the evidence establishes that only 10 packages tested positive for cocaine.

Thank you.

THE COURT: All right, I am going to deny your objection. The chemist did testify that he weighed each box, there was 502.8 kilograms, he did a, he sampled a number of the kilos, I think the purity level was 91 percent, there is no indication that there was any of these kilos contained sugar or flour or any of the kinds of cases that you cite to. I think the methodology employed by the chemist is reasonable and there is no basis for the objection.

* * * *